Peter Chang Nyuk Ming v Timbalan Menteri Dalam Negeri & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-2–01 OF 2023(S)
MARY LIM, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
10 JULY 2023

Constitutional Law — Habeas corpus — Detention order — Suspension of detention order — Appellant was issued with detention order — Deputy Minister of Home Affairs issued suspension of detention order — High Court judge dismissed application for issuance of writ of habeas corpus — Whether detention order still subsisted — Whether there was requirement of physical detention before remedy of habeas corpus could be invoked — Whether detention invalid — Whether writ of habeas corpus was available to appellant — Courts of Judicature Act 1964 s 25(2) & Schedule, para 1 — Criminal Procedure Code — Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6(1), (3) & 7 — Federal Constitution arts 5(2) & 149

Pursuant to a detention order issued by the Deputy Minister of Home Affairs ('the first respondent'), the appellant was detained at Pusat Pemulihan Akhlak, Simpang Renggam, Johor for a period of two years. He was alleged to have been involved in activities related to trafficking in dangerous drugs. Such activities were said to have threatened public order in which case action against him had to be taken under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316'). However, the first respondent had subsequently issued a suspension of the detention order, the effect of which was that the appellant was detained for a period of two years at Mukim Chin-Chin, Daerah Jasin, Melaka with some restrictions on his movement, inter alia, the appellant was required to report to the local police every Monday of the week and for him to be affixed with an electronic monitoring system. The appellant applied for a writ of habeas corpus, but such application was dismissed by the learned High Court judge who agreed with the preliminary objection raised by the learned senior federal counsel ('the SFC') that such writ did not lie where the 'corpus' was not or was no longer in physical detention.

Held, setting aside the decision of the High Court and ordering the issuance of writ of habeas corpus forthwith:

(1) Under Act 316, three types of order may be issued, namely restriction order (under s 6(3)), detention order (under s 6(1)) and suspension of detention order (under s 7). In the present case, for all intents and

purposes, the detention order subsisted. The suspension of its operation and placing the appellant in the Mukim of Chin-Chin with restrictions imposed did not alter the fact that the detention order that was first issued against the appellant was still very much 'alive'. The appellant was always detained under a detention order, and not a restriction order. That was why in the event the suspension order was revoked, the detention order would come into operation. Therefore, the learned judge was clearly in error when His Lordship held that the writ of habeas corpus was not available to the appellant (see paras 7 & 12–14).

(2) In any event, the placement of the appellant with restrictions imposed under s 7(1) of Act 316 or even if there was a restriction order issued under s 6(3) of Act 316 in the first place instead of a detention order, did not disentitle the appellant to a writ of habeas corpus. This remedy remained available at all times. The power to issue a writ of habeas corpus was actually part of the additional powers of the High Court for the protection and enforcement of rights in Part II of the Federal Constitution ('the Constitution'). These additional powers which were provided in s 25(2) of the Courts of Judicature Act 1964 ('Act 91') were set out in para 1 to the Schedule of Act 91. These additional powers were invoked in relation to the rights in Part II of the Constitution, the provisions of which must be given a generous and liberal interpretation so that the rights, safeguards and protection afforded under the Constitution, in this case, art 5, did not become mere platitudes (see paras 15 & 17–18).

(3) Although the exercise of these additional powers must be in accordance with any written law or rules of court relating to the same, such laws being the Criminal Procedure Code in this case, that purpose and intent for the existence of these additional powers must always weigh in the mind of any adjudicating body. These powers were enacted in order to protect and enforce the rights in Part II of the Constitution; and an application for habeas corpus was an invocation for close and careful scrutiny by the courts. The courts must therefore refrain from taking a narrow view as was adopted in the earlier line of decisions of *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors* [2006] 1 MLJ 405; *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95, and *Sureshwaran a/l V Rajoo lwn Ketua Polis Negara dan yang lain* [2015] 6 MLJ 695 ('the earlier decisions'). Thus, the narrow construct and requirement for physical detention before the remedy of habeas corpus was available was no longer good law (see paras 20–21).

(4) The Federal Court in the case of *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203 ('Lei Meing') found that a writ of habeas corpus was not predicated upon the fact of continuing physical custody under a subsisting detention order or any

other form of detention because it was the legality and validity of the detention which was under review, not the matter of physical detention. Article 5(2) of the Constitution must be 'given full and substantive effect' and the remedy remained available even if the detainee had since been discharged. The Federal Court further found that a full and proper construction of art 5(2) required the whole or entire series of transactions, detentions or orders to be scrutinised. In this case, it was obvious that the suspension order could not stand discrete from the detention order, it was dependent on the detention order (see para 23).

(5) Despite being alerted to this recent decision of *Lei Meng*, the learned judge chose to follow instead the earlier decisions. This was clearly wrong. Further, in view of the principle of stare decisis especially when the Federal Court in *Lei Meng* had categorically held that the legal reasoning in these decisions were 'flawed and ought not to be followed', the decision of the High Court could not be sustained. This principle of stare decisis was of paramount importance in our jurisprudence; otherwise, the confidence and integrity of the administration of justice would be severely undermined. For these reasons, the decision of the High Court ought to be set aside (see paras 24–27).

(6) Generally, the proper consequential order would be to remit the application to the High Court for consideration on the merits of the application. However, learned SFC had conceded that the present detention order suffered from the serious deficit which rendered the detention unlawful, null and void. There were no specifications of the presence of a substantial body of persons, be it in the detention order or the grounds of detention, as was required under the terms of art 149 of the Constitution under which Act 316 was enacted. The stark absence of this requisite rendered the detention of the appellant invalid. In such circumstances, it would serve no useful purpose to then remit the case for hearing on the merits (see paras 28–29 & 31).

[Bahasa Malaysia summary

Menurut perintah tahanan yang dikeluarkan oleh Timbalan Menteri Dalam Negeri ('responden pertama'), perayu telah ditahan di Pusat Pemulihan Akhlak, Simpang Renggam, Johor untuk tempoh dua tahun. Dia didakwa terlibat dalam aktiviti berkaitan pengedaran dadah berbahaya. Kegiatan seumpama itu dikatakan mengancam ketenteraman awam yang mana tindakan terhadapnya terpaksa diambil di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 316'). Bagaimanapun, responden pertama kemudiannya telah mengeluarkan penggantungan perintah tahanan yang menyebabkan perayu ditahan selama tempoh dua tahun di Mukim Chin-Chin, Daerah Jasin, Melaka dengan beberapa sekatan ke atas pergerakannya, antara lain, perayu dikehendaki melaporkan kepada polis tempatan setiap hari Isnin dalam seminggu dan dia juga dikehendaki

untuk memakai sistem pemantauan elektronik. Perayu memohon writ habeas corpus, tetapi permohonan tersebut telah ditolak oleh hakim Mahkamah Tinggi yang arif yang bersetuju dengan bantahan awal yang dibangkitkan oleh peguam kanan persekutuan yang bijaksana ('PKP') bahawa writ tersebut tidak terpakai di mana 'corpus' tidak atau tidak lagi dalam tahanan fizikal.

Diputuskan, mengenepikan keputusan Mahkamah Tinggi dan memerintahkan agar writ habeas corpus diberikan secepat mungkin:

(1) Di bawah Akta 316, tiga jenis perintah boleh dikeluarkan, iaitu perintah sekatan (di bawah s 6(3)), perintah tahanan (di bawah s 6(1)) dan penggantungan perintah tahanan (di bawah s 7). Dalam kes ini, untuk semua maksud dan tujuan, perintah tahanan masih wujud. Penggantungan pengoperasiannya dan menempatkan perayu di Mukim Chin-Chin dengan sekatan yang dikenakan tidak mengubah hakikat bahawa perintah tahanan yang mula-mula dikeluarkan terhadap perayu masih lagi 'hidup'. Perayu sentiasa ditahan di bawah perintah tahanan, dan bukan perintah sekatan. Itulah sebabnya sekiranya perintah penggantungan tersebut dibatalkan, perintah tahanan akan mula berkuat kuasa. Oleh itu, hakim yang bijaksana jelas terkhilaf apabila Yang Arif memutuskan bahawa writ habeas corpus tidak tersedia kepada perayu (lihat perenggan 7 & 12–14).

(2) Dalam apa jua keadaan, peletakan perayu dengan sekatan yang dikenakan di bawah s 7(1) Akta 316 atau jikapun terdapat perintah sekatan yang telah dikeluarkan di bawah s 6(3) Akta 316 dan bukannya perintah tahanan, tidak membatalkan hak perayu kepada writ habeas corpus. Remedi ini kekal tersedia sepanjang masa. Kuasa untuk mengeluarkan writ habeas corpus sebenarnya adalah sebahagian daripada kuasa tambahan Mahkamah Tinggi untuk perlindungan dan penguatkuasaan hak dalam Bahagian II Perlembagaan Persekutuan ('Perlembagaan'). Kuasa tambahan ini yang diperuntukkan dalam s 25(2) Akta Mahkamah Kehakiman 1964 ('Akta 91') telah dinyatakan dalam perenggan 1 kepada Jadual bagi Akta 91. Kuasa tambahan ini digunakan berhubung dengan hak dalam Bahagian II Perlembagaan, yang peruntukannya mesti diberikan tafsiran yang 'generous' dan 'liberal' supaya hak, langkah penjagaan dan perlindungan yang diberikan di bawah Perlembagaan, dalam hal ini, perkara 5, tidak menjadi kata-kata kosong semata-mata (lihat perenggan 15 & 17–18).

(3) Walaupun penggunaan kuasa tambahan ini mestilah mengikut mana-mana undang-undang bertulis atau peraturan mahkamah yang berkaitan dengannya, dalam kes ini undang-undang yang dimaksudkan adalah Kanun Tatacara Jenayah, tujuan dan niat untuk kewujudan kuasa tambahan ini mestilah sentiasa dipertimbangkan dalam fikiran mana-mana badan yang menghakimi. Kuasa ini digubal untuk

melindungi dan menguatkuasakan hak dalam Bahagian II Perlembagaan; dan permohonan untuk habeas corpus adalah permohonan untuk pemeriksaan rapi dan teliti oleh mahkamah. Oleh itu, mahkamah mesti mengelak daripada mengambil pandangan sempit seperti yang diterima pakai dalam beberapa keputusan terdahulu iaitu *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors* [2006] 1 MLJ 405; *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95, dan *Sureshwaran a/l V Rajoo lwn Ketua Polis Negara dan yang lain* [2015] 6 MLJ 695 ('keputusan-keputusan terdahulu'). Oleh itu, tafsiran sempit dan keperluan untuk penahanan fizikal sebelum remedi habeas corpus tersedia bukan lagi undang-undang yang baik (lihat perenggan 20–21).

(4) Mahkamah Persekutuan dalam kes *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203 ('Lei Meing') mendapati bahawa writ habeas corpus tidak bersandarkan kepada fakta penahanan fizikal secara berterusan di bawah perintah tahanan yang masih berkuatkuasa atau apa-apa bentuk penahanan lain kerana yang disemak adalah keabsahan dan kesahihan penahanan, bukan soal penahanan fizikal. Perkara 5(2) Perlembagaan mesti 'diberikan kesan penuh dan substantif' dan remedi tersebut kekal tersedia walaupun tahanan telah dilepaskan. Mahkamah Persekutuan selanjutnya mendapati tafsiran penuh dan betul bagi perkara 5(2) memerlukan kesemua atau keseluruhan siri transaksi, penahanan atau perintah diteliti. Dalam kes ini, adalah jelas bahawa perintah penggantungan tersebut tidak boleh berdiri secara berasingan daripada perintah tahanan, ia bergantung kepada perintah tahanan tersebut (lihat perenggan 23).

(5) Walaupun telah dimaklumkan tentang keputusan terbaru dalam kes *Lei Meng* ini, hakim yang bijaksana memilih untuk mengikuti keputusan-keputusan terdahulu tersebut. Ini adalah jelas salah. Selanjutnya, mengambil kira prinsip stare decisis terutamanya apabila Mahkamah Persekutuan di dalam kes *Lei Meng* secara mutlak memutuskan bahawa alasan undang-undang dalam keputusan-keputusan tersebut adalah 'flawed and ought not to be followed', keputusan Mahkamah Tinggi tidak dapat dikekalkan. Prinsip stare decisis ini amat penting dalam perundangan kita; jika tidak, keyakinan dan integriti pentadbiran keadilan akan terjejas teruk. Atas sebab-sebab ini, keputusan Mahkamah Tinggi patut diketepikan (lihat perenggan 24–27).

(6) Secara amnya, perintah berbangkit yang sewajarnya ialah mengembalikan permohonan kepada Mahkamah Tinggi untuk pertimbangan atas merit permohonan tersebut. Bagaimanapun, PKP yang bijaksana telah mengakui bahawa perintah tahanan ini mengalami defisit yang serius yang menyebabkan penahanan tersebut menyalahi

undang-undang, terbatal dan tidak sah. Tiada spesifikasi kehadiran sekumpulan besar orang, sama ada dalam perintah tahanan atau alasan penahanan, seperti yang dikehendaki di bawah terma perkara 149 Perlembagaan di mana Akta 316 digubal. Ketiadaan nyata syarat ini menyebabkan penahanan perayu tidak sah. Dalam keadaan sedemikian, tidak ada tujuan yang berguna untuk mengembalikan kes ini untuk dibicarakan berdasarkan merit (lihat perenggan 28–29 & 31).]

Cases referred to

Asmira bt Misman v Timbalan Menteri Dalam Negeri, Malaysia & Ors (05HC-169–09 of 2022(B)) (unreported) (refd)
Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors [1985] 2 MLJ 95; [1985] CLJ Rep 59, SC (refd)
Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323, FC (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (refd)
Letitia Bosman v Public Prosecutor and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)
Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors [2006] 1 MLJ 405; [2006] 1 CLJ 593, FC (refd)
Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601, FC (refd)
Sureshwaran a/l V Rajoo lwn Ketua Polis Negara dan yang lain [2015] 6 MLJ 695; [2015] 1 LNS 895, CA (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, para 1
Criminal Procedure Code s 365, Chapter XXXVI
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6(1), (3), (3)(a), (3)(b), (3)(c), (3)(d), (3)(e), (3)(f), (3)(g), (3)(h), (3)(i), (3)(j), 7, 7(1), (3)
Dangerous Drugs Act 1952 s 2
Federal Constitution arts 5, 5(2), 149, Part II

Appeal from: *Peter Chang Nyuk Ming v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2022] MLJU 3603 (High Court, Kota Kinabalu)

K Rakhbir Singh (Rakhbir Singh & Co) for the appellant.
Zulkipli bin Abdullah (with Nuur Izham bin Ismail) (Legal Advisor's Office,

Ministry of Home Affairs) for the respondent.

Mary Lim FCJ (delivering judgment of the court):

[1] The appellant filed for the issue of a writ of habeas corpus. The application was dismissed by the learned judge who agreed with the preliminary objection raised by the learned senior federal counsel (SFC); that such writ does not lie where the corpus is not or is no longer in physical detention. We disagree and these are our reasons.

SOME MATERIAL FACTS

[2] Pursuant to a detention order dated 30 August 2021 issued under the hand of the first respondent, the appellant was detained at Pusat Pemulihan Akhlak, Simpang Rengam, Johor for a period of two years. He is alleged to have been involved in activities related to trafficking of dangerous drugs as defined under s 2 of the Dangerous Drugs Act 1952 (Act 234). Those activities were said to have threatened public order in which case action against him had to be taken under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316).

[3] On 21 January 2022, the first respondent issued a suspension of the detention order leading the appellant to be 'detained for a period of two years at Mukim Chin-Chin Daerah Jasin, Melaka' on a list of eight restrictions or conditions concerning his movement and the need to report to the local police every Monday of the week. Although it is not clear if the appellant was in fact affixed with an electronic monitoring device or EMD, one of those conditions did specify that he was liable to be so affixed.

[4] The appellant moved the court for a writ of habeas corpus on the grounds, inter alia, that his detention was invalid, null and void; that there was a breach of the provisions of the Federal Constitution and/or the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316); that the grounds for his detention were capricious, vague and without substance.

[5] On the hearing of the application, the learned SFC raised the preliminary objection of a wrong mode; that because the appellant was now restricted under a restriction order, the proper mode should have been an application for a judicial review seeking declaratory orders or such similar orders and not through a criminal application for an order of habeas corpus under s 365 of the Criminal Procedure Code ('the CPC'). The decisions in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors* [2006] 1 MLJ 405; [2006] 1 CLJ 593; *Sureshwaran a/l V Rajoo lwn Ketua*

Polis Negara dan yang lain [2015] 6 MLJ 695; [2015] 1 LNS 895, were cited in support.

DECISION OF THE HIGH COURT

[6] The learned judge agreed; finding that since the appellant was no longer under imprisonment; neither was he physically detained in any detention centre, that he was in fact allowed to move about freely within the district of Jasin, there was no detention of 'such a nature as to attract the application of a writ of habeas corpus and does not fall within the ambit of s 365 CPC'. The writ of habeas corpus was thus not available to the appellant.

OUR DECISION

[7] Under Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316), three types of orders may be issued, namely restriction order, detention order, and suspension of detention order:

> 6 Power to order detention and restriction of persons
>
> (1) Whenever the Minister, after considering —
>
> (a) the complete report of investigation submitted under subsection 3(3); and
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> (b) the report of the Inquiry Officer submitted under subsection 5(4), is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.
>
> (2) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as a 'place of detention') as the Minister may direct and in accordance with any instructions issued by the Minister and any regulations made under section 22.
>
> (3) If the Minister is satisfied that for the purpose mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but for that purpose it is unnecessary to detain him, he may make an order (hereinafter referred to as a 'restriction order') imposing upon that person (hereinafter referred to as a 'restricted person') all or any of the following restrictions and conditions:
>
> (a) that he shall be subject to the supervision of the police for any period not exceeding two years;

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(b) that he shall reside within the limits of any State or any Federal Territory or any area thereof specified in the restriction order;

(c) that he shall not transfer his residence to any other area without the written authority of the Chief Police Officer of the State or Federal Territory concerned;

B

(d) that except in so far as may be otherwise provided by the restriction order, he shall not leave the area within which he resides without the written authority of the Chief Police Officer of the State or Federal Territory concerned;

C

(e) that he shall at all times keep the Officer in Charge of the Police District in which he resides notified of the house or place in which he resides;

(f) that he shall at such time or times as may be specified in the restriction order present himself at the nearest police station;

D

(g) that he shall remain within doors, or within such area as may be defined in the restriction order, between such hours as may be specified in the restriction order, unless he obtains special permission to the contrary from the Officer in Charge of the Police District;

E

(h) that except in so far as may be otherwise provided by the restriction order, he shall not enter any area specified in the restriction order;

(i) that he shall keep the peace and be of good behaviour;

F

(j) that he shall enter into a bond, with or without sureties as the Minister may direct and in such amount as may be specified in the restriction order, for his due compliance with the restrictions and conditions imposed on him by the restriction order.

(4) ...

G

(5) ...

(6) ...

(7) ...

7 Suspension of detention orders

H

(1) The Minister may, at any time, direct that the *operation of any detention order be suspended* subject to all or any of the restrictions and conditions which he is empowered by subsection 6(3) to impose by a restriction order, and subject, if the Minister so directs, to the requirement that the person against whom the detention order was made shall enter into a bond as provided in subsection 6(4).

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(2) Where a detention order is suspended as aforesaid, subsection 6(6) shall have effect as if the restrictions and conditions on which the detention order is suspended were restrictions and conditions imposed by a restriction order.

(3) The Minister may revoke the suspension of any detention order if he is satisfied that the person against whom the detention order was made has failed to observe any restriction or condition imposed upon him or that it is necessary in the interest of public order that the suspension should be revoked, and in any such case the revocation of the suspension shall be sufficient authority to any police officer to re-arrest without warrant the person against whom the detention order was made, and that person shall as soon as practicable be returned to his former place of detention or, if the Minister so directs, sent to another place of detention.

(4) The suspension of any detention order as aforesaid shall, subject to subsection 6(6) as applied by subsection (2) and subject also to subsection (3), continue in force for the unexpired portion of the period of the detention order specified under subsection 6(1) or under subsection 11A(1). (Emphasis added.)

SUSPENSION OF THE DETENTION ORDER

[8] It is not in dispute that at the time of filing of the application for a writ of habeas corpus an order suspending the operation of the detention order had already been issued (suspension order). Pursuant to this order, the appellant was then moved from Pusat Pemulihan Akhlak, Simpang Rengam, Johor to the Mukim or Township of Chin-Chin in the District of Jasin, Melaka.

[9] The significance of the suspension order cannot be overstated. While a detention order is issued under s 6(1), a suspension order is issued under s 7. Instead of issuing a detention order, the first respondent may in fact issue a restriction order under s 6(3). Such a restriction order is issued where the first respondent is satisfied that it is unnecessary to detain the appellant, yet it is necessary that control and supervision should be exercised over him or that restrictions and conditions should be imposed in respect of his activities, freedom of movement or places of residence or employment. The restrictions or conditions that may be imposed are those as set out in s 6(3)(a) to (j).

[10] After a detention order has been issued, first respondent may, under s 7(1), suspend the operation of that order subject to the imposition of all or any of the restrictions found in s 6(3)(a) to (j). And, this is precisely what happened here. The operation of the detention order was suspended and a list of restrictions were imposed. Although the place of detention has changed, the appellant is no less serving under a detention order. It is only the operation of the detention order that has been suspended, not the detention order itself. That detention order remains in place and was never revoked.

[11] Section 7(3) further states that in the event the restrictions or conditions imposed under s 7(1) are breached, the first respondent may revoke the suspension order, and have the appellant rearrested without warrant.

Where that happens, the appellant is either returned to Pusat Pemulihan Akhlak, Simpang Rengam, Johor or to any other place of detention as directed by the first respondent.

[12] Consequently, for all intents and purposes, the detention order subsists. The suspension of its operation and placing the appellant in the Mukim of Chin-Chin with restrictions imposed does not alter the fact that the detention order that was first issued against the appellant is still very much 'alive'. For easier comprehension, the circumstance of a suspension of a detention order may be likened to a stay of an order of court. By no means or any stretch of the imagination can it ever be suggested that the stay of the execution of an order of court means that the order no longer exists, nor is it any less valid.

[13] Further, the suspension order merely suspends the operation of the detention order. The imposition of any or all the restrictions and conditions found in s 6(3)(a) to (j) does not mean that there is now a restriction order in place of the detention order. That is why in the event the suspension order is revoked, the detention order comes into operation. When it does, it does not replace a restriction order as there is none to begin with. The appellant was always detained under a detention order, and not a restriction order.

[14] Thus, the learned judge was clearly in error when His Lordship held that the writ of habeas corpus was not available to the appellant.

[15] In any event, the placement of the appellant with restrictions imposed under s 7(1) or even if there was a restriction order issued under s 6(3) in the first place instead of a detention order, does not disentitle the appellant to a writ of habeas corpus. This remedy remains available at all times. The guiding principles on the exercise of judicial powers of intervention when faced with complaints of violations of fundamental liberties under the Federal Constitution through the issue of writs of habeas corpus have since been further developed and clarified from the cases relied on by the High Court.

[16] Section 365 is nestled in Chapter XXXVI of the CPC. That Chapter contains provisions dealing with directions of the nature of a habeas corpus. Section 365 reads as follows:

> 365 The High Court may whenever it thinks fit direct —
>
> (1) that any person who:
>
> (a) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992 [Act 479]; or
>
> (b) is alleged to be illegally or improperly detained in public or private

custody within the limits of Malaysia,
be set at liberty;

(2) that any defendant in custody under a writ of attachment be brought before the Court to be dealt with according to law.

[17] The power to issue a writ of habeas corpus is actually part of the additional powers of the High Court for the enforcement of rights in Part II of the Federal Constitution, especially the rights enshrined in art 5(2). These additional powers which are provided in s 25(2) of the Courts of Judicature Act 1964 (Act 91) are set out in para 1 to the Schedule of Act 91:

ADDITIONAL POWERS OF HIGH COURT

Prerogative writs

1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[18] These additional powers are invoked in relation to the rights in Part II of the Federal Constitution, the provisions of which must be given a generous and liberal interpretation so that the rights, safeguards and protection afforded under the Federal Constitution, in this case, art 5, do not become mere platitudes. There is a plethora of authorities in this respect; see for instance *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 at para [25]; *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 at para [50]; *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601 at para [43] and *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759.

[19] In *Zaidi bin Kanapiah*, the Chief Justice said:

[134] It is a settled principle of constitutional construction that constitutional provisions and laws which safeguard fundamental rights must be read generously and in a prismatic fashion while provisions that limit or derogate from those rights must be read restrictively (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at para 13).

[20] Although the exercise of these additional powers must be in accordance with any written law or rules of court relating to the same, such laws being the CPC in this case, that purpose and intent for the existence of these additional powers must always weigh in the mind of any adjudicating body. These powers are enacted in order to protect and enforce the rights in Part II of the Federal Constitution; and an application for habeas corpus is an invocation for close and careful scrutiny by the courts.

[21] Courts must therefore refrain from taking a narrow view as was adopted in the earlier line of decisions of *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors*; *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95; [1985] CLJ Rep 59, and *Sureshwaran a/l V Rajoo lwn Ketua Polis Negara dan yang lain*. Thus, the narrow construct and requirement for physical detention before the remedy of habeas corpus is available is no longer good law.

[22] This court in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 had reminded that 'it is legally incorrect to state that the jurisdiction of the High Court to issue a writ of habeas corpus stems from the fact of detention or the continued physical custody of the person. To maintain that a writ of habeas corpus only issues if continued physical custody is present, and that such continued physical custody can only exist where there is current order of detention in existence is, with great respect, a flawed understanding of the law relating to unlawful detention and release, of the law of habeas corpus. The correct legal position is that the actual physical custody of the detainee under a subsisting detention order only, is not a pre-condition to the grant of the remedy of release under art 5(2) of the FC. It is however generally necessary that the detained seeking release is in detention at the time when the application for release or habeas corpus is sought vide an application to the High Court'.

[23] At paras [81]–[84], this court further reasoned that a writ of habeas corpus is not predicated upon the fact of continuing physical custody under a subsisting detention order or any other form of detention because it is the legality and validity of the detention which is under review, not the matter of physical detention. Article 5(2) of the Federal Constitution must be 'given full and substantive effect' and the remedy remains available even if the detainee has since been discharged. At para [87], the Federal Court also reasoned that a full and proper construction of art 5(2) requires the whole or entire series of transactions, detentions or orders to be scrutinised. In this case, it is obvious that the suspension order cannot stand discrete from the detention order, it is dependent on the detention order.

[24] Despite being alert to this recent decision of *Lei Meng*, the learned judge chose to follow instead the earlier decisions in *Sejahratul Dursina @ Chomel bte Abdullah v Kerajaan Malaysia & Ors*; *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors*, and *Sureshwaran a/l V Rajoo lwn Ketua Polis Negara dan yang lain*. This is apparent from para [26] where His Lordship reasoned that because the appellant was 'not under imprisonment or physically detained in any detention centre; was not physically detained ... is free to move about within the said District', and 'applying the principles enunciated by the appellate courts in *Sejahratul Dursina*, *Cheow Siong Chin* and *Sureshwaran*

above to the facts of the present case, a suspension of detention order which have the effect of a restricted residence order does not constitute detention of such a nature as to attract the application of a writ of habeas corpus and does not fall within the ambit of s 365 of the CPC'.

[25] This is clearly wrong. Further, in view of the principle of stare decisis especially when the Federal Court in *Lei Meng* had categorically held that the legal reasoning in these decisions are 'flawed and ought not to be followed' — see para [131], the decision of the High Court cannot be sustained.

[26] This principle of stare decisis is of paramount importance in our jurisprudence; otherwise the confidence and integrity of the administration of justice will be severely undermined. This was warned by the Chief Justice in *Zaidi bin Kanapiah* at para [36] as well as the Federal Court decision in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149:

> [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision making formed by case-law. Precedents not only have persuasive authority but also must be followed when similar circumstance arise. Any principle announced by a higher court must be followed in later cases. In short, the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set-up precedent established by prior decisions. This legal principle is called stare decisis. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of stare decisis, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

[27] For these reasons, the decision of the High Court must be set aside.

[28] Generally, the proper consequential order would be to remit the application to the High Court for consideration on the merits of the application. However, learned SFC has conceded that the present detention order suffers from the serious deficit which renders the detention unlawful, null and void as determined in *Selva Vinayagam* and *Asmira bt Misman v Timbalan Menteri Dalam Negeri, Malaysia & Ors* (05HC-169–09 of 2022(B)) (unreported).

A **[29]** There are no specifications of the presence of a substantial body of persons, be it in the detention order or the grounds of detention, as is required under the terms of art 149 of the Federal Constitution under which Act 316 was enacted. The stark absence of this requisite renders the detention of the appellant invalid.

B **[30]** We record our appreciation to learned SFC for that concession.

[31] In such circumstances, it would serve no useful purpose to then remit the case for hearing on the merits. In order to do substantial justice, we accept C the concession of learned SFC and we order that a writ of habeas corpus to be issued forthwith.

Decision of High Court set aside; and issuance of writ of habeas corpus forthwith ordered.

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Reported by Dzulqarnain Ab Fatar

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